

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MIKEL PLETT,

Plaintiff,

v.

S. FOSTER, WALLARD, and JOHN
DOE,

Defendants.

Case No. 1:22-cv-01261-KES-HBK (PC)

ORDER RECALLING FINDINGS AND
RECOMMENDATIONS

(Doc. No. 17)

ORDER NOTING VOLUNTARY
DISMISSAL UNDER FED. R. CIV. P.
41(a)(1)(A)(i) OF CERTAIN DEFENDANTS
AND CLAIMS

ORDER DIRECTING CLERK TO REVISE
DOCKET TO REFLECT ONLY NAMED
DEFENDANT

(Doc. No. 21)

Plaintiff Mikel Plett, a prisoner, is proceeding pro se and *in forma pauperis* in this action filed under 42 U.S.C. § 1983. On June 29, 2023, this Court issued a screening order on Plaintiff's Complaint. (Doc. No. 12). As discussed in this Court's screening order, the Complaint states a cognizable Eighth Amendment excessive use of force claim against Defendant S. Foster but no other claim. (*Id.* at 8). Specifically, the Court found the Complaint did not state any cognizable claim against Defendants Wallard or John Doe, and no cognizable retaliation claim against Defendant Foster. (*See generally id.*). The Screening Order afforded Plaintiff the opportunity to (1) file an amended complaint; (2) file a notice under Rule 41 that he is willing to proceed only on

1 the claims the court found cognizable in its screening order; or (3) stand on his Complaint subject
2 to the undersigned issuing Findings and Recommendations to dismiss the defendants and claims
3 not deemed cognizable. (*Id.* at 8-9).

4 On July 13, 2023, Plaintiff filed a First Amended Complaint. (Doc. No. 13). On October
5 4, 2023, the undersigned issued a second Screening Order, finding the First Amended Complaint
6 failed to state any cognizable claim and afforded the option to either (1) stand on his original
7 Complaint as screened; (2) stand on his FAC subject to the undersigned recommending the
8 district court dismiss the action; or (3) voluntarily dismiss the case. (Doc. No. 16 at 1). On
9 November 20, 2023, after Plaintiff failed to respond to the October 4, 2023 Screening Order, the
10 undersigned issued a Findings and Recommendations (“F&R”) to dismiss Plaintiff’s case for
11 failure to comply with court orders and failure to prosecute. (Doc. No. 17). Plaintiff did not file
12 any objections to the F&R. *See* docket.

13 On April 12, 2024, the newly assigned District Judge issued an Order directing Plaintiff to
14 file a notice within 30 days electing one of three options: (1) stand on his initial Complaint and
15 proceed with his Eighth Amendment claim against Defendant Foster; (2) stand on his first
16 amended complaint subject to the magistrate judge recommending dismissal, or (3) voluntarily
17 dismiss the case without prejudice. (Doc. No. 21 at 3). On April 19, 2024, Plaintiff filed a signed
18 Notice stating, “Yes, I want (A) intend to stand on his initial [sic] complaint & proceed on the
19 eighth Amendment claim against [sic] Defendant Foster . . .” (Doc. No. 22). The Court construes
20 the pleading as notice pursuant to Rules 41 and 15.

21 Plaintiff may voluntarily dismiss any defendant or claim without a court order by filing a
22 notice of dismissal before the opposing party answers the complaint or moves for summary
23 judgment. Fed. R. Civ. P. 41 (a)(1)(A)(i). Here, no party has answered or moved for summary
24 judgment. *See* docket. Further, the Ninth Circuit recognizes a party has an absolute right prior to
25 an answer or motion for summary judgment to dismiss fewer than all named defendants or claims
26 without a court order. *Pedrina v. Chun*, 987 F.2d 608, 609-10 (9th Cir. 1993). And Plaintiff may
27 properly dismiss certain claims against a Defendant under Federal Rule of Civil Procedure 15(a).
28 *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 403 F.3d 683, 687 (9th Cir. 2005) (Rule 15(a))

1 “is appropriate mechanism” when party is eliminating an issue or one or more claims but not
2 completely dismissing a defendant). In accordance with Plaintiff’s notice, Defendants Wallard
3 and John Doe and the remaining claims against Defendant Foster are dismissed without prejudice
4 by operation of law. Fed. R. Civ. P. 41(a)(1)(A)(i); Fed. R. Civ. P. 15(a). Plaintiff’s Complaint
5 will proceed on Plaintiff’s Eighth Amendment excessive use of force claim against Defendant
6 Foster. (*See* Doc. No. 1). The Court will direct service of process on Defendant Foster by
7 separate order.

8 Accordingly, it is **ORDERED**:

- 9 1. The Findings and Recommendations filed on November 20, 2023 (Doc. No. 17) are
10 **RECALLED**.
- 11 2. The Clerk of Court shall correct the docket to reflect Plaintiff’s notice of voluntary
12 dismissal under Rule 41(a)(1) of Defendants Wallard and John Doe.
- 13 3. The Court will direct service upon Defendant Foster by separate Order.
- 14

15 Dated: April 22, 2024

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17 HELENA M. BARCH-KUCHTA
18 UNITED STATES MAGISTRATE JUDGE
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